TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 787

L. McLEOD, PETITIONER,

vs.

M. C. THRELKELD, ET AL., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

Civil Action

No. 705

L. McLeod

vs.

M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr., Doing Business as Threlkeld Commissary Company, a Partnership

Stipulation—Filed April 28, 1942

It is agreed and stipulated between the parties to the above entitled and numbered cause, acting herein by and through their respective attorneys thereunto duly authorized, as follows:

I

Threlkeld Commissary Company (hereinafter called "defendant") is a partnership composed of M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr. Each of these individuals is a citizen and resident of the State of California. It is engaged in the business of providing meals for certain employees of railway companies commonly known as maintenance of way employees who perform work upon the right of way, lines, and tracks of railway companies. De- [fol. 12] fendant, by a contractual arrangement with Texas and New Orleans Railroad Company (hereinafter called "railroad company"), furnishes boarding service which is available to the railroad company's maintenance of way employees. The board paid by such employees varies in accordance with the type of gang with which they are working, the employees in the B. & B. gangs paying the highest board and the employees in track extra gangs paying the lowest board. Most of the maintenance of way employees of the railroad company board with the defendant but some do not. In addition to furnishing meals to such employees

the defendant also furnishes bedding to the employees boarding with it. Employees boarding with the defendant sign wage deduction orders authorizing the railroad company to deduct from the wages of such employees the amount of board due by said employees and to pay the same over to defendant. Employees boarding with the defendant are not given credit for single meals missed (except when away on company business) but in all cases are given credit when three or more consecutive meals are missed after notice to the defendant.

II

Meals served to the railroad employees above mentioned are prepared and served in a cook and dining car running on the railroad's rails and attached to a particular gang or outfit. Employees of the railroad other than those in the gang or outfit to which a particular cook and dining car is attached on occasions are served therein and such em- [fol. 13] ployees pay at a fixed price per meal. Each cook and dining car is in charge of a cook employed by the defendant whose duty it is to cook and serve meals in the dining car and to keep the kitchen and dining car clean and suitable for the serving of meals. He is also required to keep an account of the meals served. In case of emergency work done by the maintenance of way employees the cook is required to prepare and serve meals during such emergency and to follow the crew to the point of such emergency work. Plaintiff L. McLeod was employed by defendant as a cook during the period from July, 1939, to May, 1941, and performed the duties of a cook as hereinbefore stated. He worked exclusively at points on the lines of the railroad company within the state of Texas. The foreman employed by the railroad company in charge of each gang to which a dining and cooking car is attached acts on behalf of defendant to check the supplies and receipts of each car and for these services he receives free board or in lieu thereof a monthly cash consideration.

III

Texas and New Orleans Railroad Company is a common carrier engaged in the interstate transportation of both goods and persons. Employees of the railroad in the gangs for which defendant furnishes board are engaged in the

work of constructing and maintaining the right of way and railroad lines of the railroad company in proper condition for the interstate transportation of persons and property by said railroad company. The practice of railroad companies with respect to the furnishing of meals for [fol. 14] maintenance of way employees varies—some railroads, as the Texas and New Orleans Railroad Company, make arrangements by contract for the furnishing of such meals or board by a commissary company, some railroads operate cook and dining cars for themselves for the benefit of such employees, some railroads furnish cook and dining cars to the employees who prepare and serve their own meals therein, and some railroads leave such employees entirely to their own devices for the procuring of their meals.

IV

Defendant, in addition to its operations in Texas on the lines of the Texas and New Orleans Railroad Company, has similar operations, under contracts with other railroads, in the states of Arizona, California, Colorado, Louisiana, Nevada, New Mexico, Oregon, and Utah.

V

The parties agree that if the court determines that plaintiff is covered by the Fair Labor Standards Act of 1938 they will make a bona fide effort to stipulate the amount of damages, if any, due to plaintiff.

Leon C. Levy, Attorney for Plaintiff. John P. Bullington, Attorney for Defendants.

[fol. 15] In the United States District Court for the Southern District of Texas, Houston Division.

[Title omitted]

The Court's Findings—Filed July 10, 1942

Now, in order that you may desire to file any further suggestions, I will make some findings on this testimony here, not that I regard it as particularly material, but it might be.

Of course I find that the Threlkeld Commissary Company

would serve meals occasionally, or whenever the occasion arose, to outsiders. The evidence is overwhelming on that. But it was not out there to make money in selling meals.

In the absence of some compelling reason to the contrary, I see nothing that would occasion the promulgation of a rule not to feed anybody else, but I think even if they did, this case would fall under the rule generally laid down, but I recognize some of the cases, for instance where a workman is engaged in the sale of goods that are tendered for commerce, and part of them go in commerce and part do not. The burden is on him to prove the present time.

[fol. 16] And in the case of the plaintiff's particular work, I find that he has not served outsiders during the particular time involved in this suit, as I understand it is the immediate two years prior to that. This testimony relates surely to what happened a long time ago, and that anything he might have served outside, in the old southwestern style is, generally an outsider might be asked if he wanted to come up, anybody, and give him a cup of coffee. It is so infinitesimally small as compared to what was done or generally served as to amount to not serving anybody but the employees of the railroad company, to such a minute degree that it is impossible of proof; and I find, based on the evidence here before me that during the period in question the plaintiff has only served meals to employees of the railroad company. I think the evidence is overwhelming to that effect. He so testifies, and others testify to it. Mr. Kitchen said 'he served one meal to me, I think on the Rio Bravo job', which was several years before the time involved in this suit, or some time before, and he invited him to have a cup of coffee with him several times, or a good many times, but I don't regard that as being material.

Now, I don't know what effect that will have on the suit, gentlemen, but that is about this testimony.

(Clerk's note: The foregoing "Court's Findings" came to the Clerk with other papers in this case from Judge Kennerly's Chambers and were filed on the date shown).

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted)]

OPINION—Filed July 10, 1942

KENNERLY, District Judge:

This is a suit by Plaintiff, an employee, against Defendants, his employer, for wages, overtime compensation, damages, attorney's fees, etc., under the Fair Labor Standards Act of 1938 (Sections 201 to 219, Title 29, U. S. C. A.), and this is a partial hearing under Rule 42(b) of the case on the merits. Plaintiff affirms and Defendants deny that the facts bring them within the scope of Sections 6 and 7 of the Act. Defendants say, however, that if they do, they are exempt under Section 13 of the Act. This Plaintiff denies.

(a) The main facts have been stipulated as follows:

[fol. 18] "It is agreed and stipulated between the parties to the above entitled and numbered cause, acting herein by and through their respective attorneys thereunto duly authorized, as follows:

Threlkeld Commissary Company (hereinafter called "defendant") is a partnership composed of M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr. Each of these individuals is a citizen and resident of the State of California. It is engaged in the business of providing meals for certain employees of railway companies commonly known as maintenance of way employees who perform work upon the right of way, lines, and tracks of railway companies. Defendant, by a contractual arrangement with Texas and New Orleans Railroad Company (hereinafter called "railroad company"), furnishes boarding service which is available to the railroad company's maintenance of way employees. The board paid by such employees varies in accordance with the type of gang with which they are working, the employees in the B. & B. gangs paying the highest board and the employees in track extra gangs paying the lowest board. Most of the maintenance of way employees of the railroad company board with the defendant but some do not. In addition to furnishing meals to such employees the defendant also furnishes bedding to the employees boarding with it. Em-

ployees boarding with the defendant sign wage deduction orders authorizing the railroad company to deduct from the wages of such employees the amount of board due by said employees and to pay the same over to defendant. Employees boarding with the defendant are not given credit for single meals missed (except when away on company business) but in all cases are given credit when three or more consecutive meals are missed after notice to the defendant.

Meals served to the railroad employees above mentioned are prepared and served in a cook and dining car running on the railroad's rails and attached to a particular gang or outfit. Employees of the railroad other than those in the gang or outfit to which a particular cook and dining car is attached on occasions are served therein and such employees pay at a fixed price per meal. Each cook and dining car is in charge of a cook employed by the defendant whose duty it is to cook and serve meals in the dining car and to keep the kitchen and dining car clean and suitable for the serving of meals. He is also required to keep an account of the meals served. In case of emergency work done by the maintenance of way employees the cook is required to prepare and serve meals during such emergency and to follow the crew to the point of such emergency work. Plaintiff L. McLead was employed by defendant as a cook during the period from July, 1939, to May, 1941, and performed the duties of a cook as hereinbefore stated. He worked exclusively at points on the lines of the railroad company within the state of Texas. The foreman employed by the railroad company in charge of each gang to which a dining and cooking car is attached acts on behalf of defendant to check the supplies and receipts of each car and for these services he receives free board or in lieu thereof a monthly cash consideration.

[fol. 19] Texas and New Orleans Railroad Company is a common carrier engaged in the interstate transportation of both goods and persons. Employees of the railroad in the gangs for which defendant furnishes board are engaged in the work of constructing and maintaining the right of way and railroad lines of the railroad company in proper condition for the interstate transportation of persons and property by said railroad company. The practice of railroad companies with respect to the furnishing of meals for maintenance of way employees varies—some railroads,

as the Texas and New Orleans Railroad Company, make arrangements by contract for the furnishing of such meals or board by a commissary company, some railroads operate cook and dining cars for themselves for the benefit of such employees, some railroads furnish cook and dining cars to the employees who prepare and serve their own meals therein, and some railroads leave such employees entirely to their own devices for the procuring of their meals.

Defendant, in addition to its operations in Texas on the lines of the Texas and New Orleans Railroad Company, has similar operations, under contracts with other railroads, in the states of Arizona, California, Colorado, Louisiana, Nevada, New Mexico, Oregon, and Utah.

The parties agree that if the court determines that plaintiff is covered by the Fair Labor Standards Act of 1938 they will make a bona fide effort to stipulate the amount of damages, if any, due to plaintiff."

(b) A part of the evidence was heard before Honorable James V. Allred, a Judge of this District, before his resignation. I quote from his memorandum of May 9, 1942:

"There was one matter which I regarded as immaterial, upon which I heard some evidence and made a finding from the bench. It was reported, as I recall.

The question upon which I heard evidence was whether the defendants' commissary served others than railroad workmen and, if so, to what degree. I found from the evidence that if they ever furnished meals to anybody else it was only upon two or three isolated occasions and so small as to be infinitesimal."

1. The pertinent portion of Section 7 of the Act (Section 207, Title 29, U. S. C. A.) is as follows:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[fol. 20] (3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Commerce is defined by the Act (Paragraph (b) of Section 203, Title 29, U. S. C. A.), as follows:

" 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Goods are defined by the Act (Paragraph (i) of Section 203, Title 29, U. S. C. A.), as follows:

" 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Production or produced is defined by the Act (Paragraph (j) of Section 203, Title 29, U. S. C. A.), as follows:

" 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Doubtless the Texas and New Orleans Railroad Company and its employees to whom Defendants furnished meals and bedding were, during the period in question and under the facts stipulated, engaged in interstate commerce, but not in the production of goods for commerce within the meaning of the Act.

Plaintiff points to the decision of the Supreme Court in *Kirschbaum* v. *Walling* and *Arsenal Building Corporation* v. *Walling*, —— U. S. —— (decided June 1, 1942), and other similar cases, and insists that since the Railroad Company and its employees were engaged in interstate commerce, Defendants and Plaintiff, under the facts stipu-

lated, were engaged in commerce within the meaning of the [fol. 21] Act.

Plaintiff overlooks the fact that the language of the Act with respect to the *production of goods for commerce* is much broader than the language of the Act with respect to *engaging in commerce.* The decisions recognize this. Then too the facts here are wholly different from the facts in the referred to case of *Kirschbaum, et al.* v. *Walling, et al.* There, substantially all the tenants in the buildings in question were engaged in the production of goods for commerce, and it was held that certain of the employees of the owner and operator of the buildings were engaged in a "process or occupation necessary to the production" of such goods. Here, no goods were produced, and Plaintiff and Defendants can be held to be under the Act, if at all, only because the Railroad Company and its employees engaged, not in the production of goods for commerce, but in commerce. In the recent case of *Overstreet* v. *North Shore Corporation,* —— Fed. —— (C. C. A. 5th, decided May 28, 1942), the court, in speaking of the Act, uses this language:

"In view of the legislative history of the Act and the precise language in which it is drafted, the courts have considered it plain that Congress did not intend for the phrase, 'engaged in commerce,' to be expanded by construction to embrace employees engaged in the performance of duties merely affecting, burdening, or obstructing interstate commerce; and decisions under other and broader legislation enacted by Congress pursuant to the power to regulate commerce have no application here. Our inquiry, therefore, is whether these employees, tested by the character of the services they performed, actually were engaged in interstate commerce."

In *Jax Beer Co.* v. *Redfern,* 124 Fed. (2d) 172, Redfern and another were employed by Jax Beer Company, a Texas corporation, to make local deliveries in and around Dallas, Texas, by truck, of beer shipped to the Beer Company in interstate commerce. There, the court said (underscoring mine):

[fol. 22] *"Certain it is that these employees were not producing goods for interstate commerce, and decision must turn upon whether or not they were engaged in interstate commerce within the meaning of the act.* We are of opinion

that the work of Redfern and Wadsworth in delivering beer for the Jax Beer Company in pursuance of its local beer distributing business were intrastate in character and that they were not 'engaged in commerce' within the meaning of the Fair Labor Standards Act. *Jewel Tea Co.* v. *Williams,* 10 Cir., 118 F. 2d. 202; *Klotz* v. *Ippolito,* D. C., 40 F. Supp. 422; *Foster* v. *National Biscuit Co.,* D. C., 31 F. Supp. 552; *Fleming* v. *Arsenal Bldg. Co.,* D. C., 38 F. Supp. 207."

I do not think that either Plaintiff or Defendants were engaged in commerce within the meaning of the Act. Judgment for Defendants.

Houston, Texas, July 10, 1942.

The Clerk will file this opinion. It is adopted as Findings of Fact and Conclusions of Law.

T. M. Kennerly,
Judge.

[fols. 23-30] In United States District Court for the Southern District of Texas, Houston Division.

Civil Action

No. 705

L. McLeod, Plaintiff

vs.

M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr., Doing Business as Threlkeld Commissary Company, a Partnership, Defendants.

Judgment—Filed August 6, 1942.

On this the 10th day of July, 1942, came on to be heard the above entitled and numbered cause and came plaintiff by his attorney and came defendants by their attorney and the Court having considered the evidence and argument of counsel and being of the opinion that the law and the facts are with defendants, it is

Ordered, Adjudged, and Decreed that plaintiff take nothing by his suit and that defendants and each of them go hence without day with their costs in this behalf expended.

T. M. Kennerly, United States District Judge.

Approved as to Form:

Leon C. Levy, Attorney for Plaintiff. John P. Bullington, Attorney for Defendants.

[fol. 31] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10434

L. McLEOD, Appellant,

vs.

M. C. THRELKELD, et al., Doing Business as Threlkeld Commissary Company, a partnership, Appellees.

In Forma Pauperis

Appealed from the District Court of the United States for the Southern District of Texas.

OPINION—Filed December 9, 1942.

Before Holmes and McCord, Circuit Judges, and Strum, District Judge.

McCORD, Circuit Judge:

Appellant's action was for recovery of overtime compensation, liquidated damages, interest, and attorney's fees [fol. 32] under the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. §§ 201-219.

Except for evidence touching the question of whether the employer's commissary "served other than railroad workmen", the facts are stipulated. The stipulated facts are carefully set out in the well-considered opinion of the trial court, *McLeod v. Threlkeld,* 46 F. Supp. 208, and no good purpose can be served by again setting them out here.

The employer was engaged in furnishing meals and beds to certain maintenance-of-way employees of a railroad. The meals were prepared and served and the beds were furnished in railway cars operating on the railroad's tracks by contract arrangement. Employees using the service paid for their own board.

Appellant was employed by appellee as cook on one of its commissary cars. His duties were to care for the car, prepare and serve meals, take care of the bedding, and keep records of the services furnished to the boarders. All of his duties were performed in Texas.

The stipulated facts clearly show that the cook was not engaged in the "production of goods for commerce", or in any "process or occupation necessary to the production thereof". He must, therefore, plant himself squarely on the contention that he was "engaged in commerce" within the meaning of Sections 6 and 7 of the Act. In this case, as in so many others involving application of the Act, the problem of the court is "one of drawing lines" and applying the Act to a particular fact situation.

In *Kirschbaum v. Walling*, 316 U. S. 517, the Supreme Court found the particular employees to be within the coverage of the Act because they were engaged "in oc- [fol. 33] cupations 'necessary to the production' of goods for commerce by the tenants". The same view was expressed in affirming this court's application of the Act to members of an oil well rotary drilling crew. *Warren-Bradshaw Drilling Co.* v. *Hall, et al.*, — U. S. —, decided November 9, 1942, affirming 124 F. 2d 42. On the agreed facts, this case is different from those cases. Here the employee did not have "a close and immediate tie" with a process for production of goods for commerce, as did the employees involved in the *Kirschbaum* and *Warren-Bradshaw* cases. McLeod was not an employee of the railroad; he performed no services for the railroad, and the railroad exercised no authority over him. Compare *Philadelphia, B. & W. R. Co. v. Smith*, 250 U. S. 101, 63 L. Ed. 869, a case arising under the Federal Employers' Liability Act, where the employee-cook held to be within the coverage of that act was working for the railroad company and moving about from place to place as a member of a gang of bridge carpenters. The present case may be distinguished on its facts: McLeod merely cooked the meals, washed the dishes, and made the beds for boarders who worked for the railroad

company. His activity was purely intrastate in character, being performed entirely within the State of Texas. The contention of the appellant, and of the Administrator of the Wage and Hour Division, as *amicus curiae,* seeks to extend the coverage of Sections 6 and 7 beyond the breaking point to cover a fact situation beyond the pale of the Fair Labor Standards Act. We think it clear that the stipulated facts establish without question that appellant was not *engaged in commerce,* but was engaged in a purely local activity not covered by the Act. See *Jax Beer Co. v. Redfern,* 124 F. 2d 172.

Our view of the case makes it unnecessary to express an opinion on the persuasive contention that under any view of the case appellee was a retail service establishment doing a wholly intrastate servicing business, and therefore with-[fols. 34-36] in the exemption contained in Section 13 (a) (2) of the Act.

Appellant was not "engaged in commerce" within the meaning and coverage of the Act.

The judgment is affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 787

L. McLEOD,

Petitioner,

vs.

M. C. THRELKELD, ET AL., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEON C. LEVY,
HARRY DOW,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 787

L. McLEOD,

Petitioner,

vs.

M. C. THRELKELD, ET AL., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, L. McLeod, prays that a writ of certiorari be issued to review the final decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on December 9, 1942, affirming the decree of the Federal District Court for the Southern District of Texas, Houston Division.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals, filed December 9, 1942, is in the record (R. pp. 31-34) and is re-

ported in 131 Fed. (2d) 880. The opinion of the District Court is in the record (R. pp. 17-22) and is reported in 46 Fed. Supp. 208.

II.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347); and under 28 U. S. C. 832.

III.

Summary Statement of the Matter Involved.

This is an appeal from a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a decision of the District Court, holding that the petitioner herein was not entitled to recover compensation for an alleged violation of the Fair Labor Standards Act of 1938 because his employment was not of such a nature as to be covered by the terms of that Act.

The suit was instituted in accordance with the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201 *et seq.*

The case was decided by the District Court upon a stipulation of facts which were, briefly, as follows: Threlkeld Commissary Company, a partnership, doing business in several States (R. pp. 14-19), holds contracts with the Texas and New Orleans Railroad Company to furnish meals and bedding to the railroad company's maintenance-of-way employees. Most, but not all, of these employees board with the respondent herein at stipulated prices which vary according to the type of "gang" in which they work. The railroad company is authorized in writing by the employees

to deduct from their wages the proper amounts and pay it over to the Commissary company.

Meals are cooked and offered to the employees in a cook-and-dining car, running on the railroad company's tracks. This car travels with the maintenance crew along the lines of the railroad. Each such car is in charge of a cook who prepares and serves the meals and keeps the car clean. In the event of emergency work being required of the maintenance crew, the cook must follow the crew to the site of the work and serve meals during such emergency. Petitioner herein was employed by the Respondent Commissary company as a cook from July, 1939 until May, 1941 and performed, within the State of Texas, the duties described above (R. pp. 12, 13, 18).

The Texas and New Orleans Railroad Company is a common carrier and is engaged in the interstate transportation of goods and persons. The railroad employees who board with respondent herein are engaged in the maintenance of railroad lines for the safe and proper transportation of goods and persons in interstate commerce. Railroad companies differ in their methods of providing these facilities for their workmen: some of them enter into contracts with commissary companies; others operate the cook-and-dining cars themselves; others provide the cars and allow the employees to prepare and provide their own food; still others make no provision whatsoever for the employees (R. pp. 13, 14).

The District Court held that neither the employee nor the employer were engaged in interstate commerce within the meaning of the Act (R. p. 22) and entered judgment for Defendant, Respondent herein. The United States Circuit Court of Appeals, upon an appeal by the Plaintiff, petitioner herein, *in forma pauperis,* affirmed the decision of the lower Court (R. pp. 31-34).

IV.

Question Presented.

The sole question presented herein is whether the petitioner, an employee engaged as a cook to prepare and serve meals to maintenance-of-way employees of a railroad, which employees are engaged in interstate commerce, is himself engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.[1]

V.

Reasons for Granting the Application.

A. The decree of the Honorable Circuit Court of Appeals is in conflict with the decisions of this Honorable Court in *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, holding that a cook employed in preparing meals for a maintenance-of-way crew was engaged in interstate commerce; *Overstreet* v. *North Shore Corp.,* 63 Sup. Ct. —, holding that the employees of a toll road lying entirely within one State are engaged in interstate commerce and with *Pederson* v. *Fitzgerald Construction Co.,* 63 Sup. Ct. —.

B. The decree of the Honorable Circuit Court of Appeals is in conflict with the holding of the Circuit Court of Appeals for the Ninth Circuit in *Womack* v. *Consolidated Timber Co.,* 132 F. (2d) 101, wherein it was held that a cook employed in a cookhouse at a lumber camp which produced goods for interstate commerce was entitled to the benefits of the Fair Labor Standards Act.

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[1] The exemption of Section 13 (a) (2) of the Act, although not affirmatively plead by respondent, has received the attention of the courts below. Petitioner's reasons for the inapplicability of that exemption are given in this brief. (*Infra,* pp. 11-14).

C. The decision of the Honorable Circuit Court of appeals raises an important question of federal law which has not been, but should be, settled by this Honorable Court.

VI.

Supporting Brief and Argument.

A. Petitioner was engaged in interstate commerce within the meaning of the Act.

Both the District Court, 46 Fed. Supp. 208, and The Circuit Court of Appeals, 131 F. (2d) 880, held that the language of the Act with respect to "production of goods for commerce" is broader than the language of the Act in regard to "commerce". Seemingly, both courts admitted that were the petitioner employed in cooking and serving meals to employees who were *producing* goods for interstate commerce, instead of to employees who were engaged *in* interstate commerce, that the decision in *Kirschbaum* v. *Walling,* 316 U. S. 517, 2 Sup. Ct. 1116 (1942) would apply, and it would follow that the petitioner would be held within the coverage of the Act. Certainly such has been the decision of several lower courts. *Womack* v. *Consolidated Timber Co.,* 43 Fed. Supp. 625, the point affirmed in 132 F. (2d) 101, 9th Cir.; *Ikola* v. *Snoqualmie Falls Lumber Co.,* 4 Wage Hour Rept. 470, reversed on procedural grounds in 121 Pac. (2d) 369; *Lagerstrom* v. *Hanson,* 5 Wage Hour Rept. 471, on appeal to the Eighth Circuit Court of Appeals.

The *Kirschbaum* decision, supra, applies to employees whose work is necessary to the continuation of interstate commerce as well as to employees whose work is necessary to the production of goods for commerce. The Fair Labor Standards Act, a remedial statute, cannot and does not contemplate any distinction between the work of one whose employer *produces* goods *for* commerce and one whose em-

ployer is engaged *in* interstate commerce. Both the stipulated policy of the Act and the economic motives inspiring its passage rule out any contrary conclusion, for a construction of the Act which recognizes a labor standard for employees necessary to production and a different labor standard for employees necessary to commerce violates the very purpose for which the Act was intended: *i. e.*, the elimination of labor cost differentials which lead to labor disputes "burdening and obstructing commerce and the free flow of goods in commerce" (Section 2 (a)).

The Courts below evidently rely upon the fact that the Fair Labor Standards Act constains no definition of the term "engaged in commerce", while defining the term "production" of goods for commerce.[2] But the lack of such definition—and, it is submitted, it was a studied and deliberate omission—may be explained by a cursory examination of the judicial decisions which were in existence at the time of the consideration and passage of this legislation. There was no necessity for the Congress explicitly to define a term which had, by repeated judicial construction, acquired a definite meaning and which had been held to include work of employees which promoted interstate commerce. This Honorable Court had, on numerous occasions, ruled that an employment to perform work "which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce * * *". *Kinzell* v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133; Also *Pederson* v. *Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 151; *Louisville & Nashville R. R.*

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[2] Sec. 3 (j): "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State".

Co. v. *Parker,* 242 U. S. 13, 14, 15; *Philadelphia & Read. Ry. Co.* v. *Di Donato,* 256 U. S. 327, 329-331; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571; *Rader* v. *Baltimore & Ohio Ry. Co.,* 108 F. (2d) 980; *So. Pac.* v. *Industrial Accident Comm.,* 251 U. S. 259.

Many of these cases, decided by this Honorable Court, arising under the Federal Employers Liability Act,[3] and holding that the employees were engaged in interstate commerce, were decided and the decisions announced prior to the amendment of that Act, on August 11, 1939, extending the scope of the Act to employees whose activities in any way directly or closely and substantially "affected" interstate commerce.[4] And in these cases, decided prior to the amendment, the Court followed the familiar doctrine that wherever was found a close and substantial relationship between the work done by the worker and interstate commerce, there was coverage under the Act. These cases were not decided upon the theory that the work merely *affected* interstate commerce but upon a finding that the worker was engaged *in* interstate commerce, as required by the Federal Employers Liability Act prior to the 1939 amendment.

The similarity between the Federal Employers Liability Act and the Fair Labor Standards Act, insofar as the "coverage" language used is concerned, has been noted by this Honorable Court in the recent case of *Overstreet* v. *North Shore Corp.,* 63 Sup. Ct. —, decision announced February 1, 1943. It was there pointed out that not only is the same term—"engaged in commerce"—used in both

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[3] Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C., sec. 51.

[4] 45 U. S. C. A. 51: "—any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter".

statutes, but also both are "aimed at protecting commerce from injury through adjustment of the master-servant relationship—".

The full force of the decisions of this Honorable Court were brought to bear upon the Congress at the time the Fair Labor Standards Act was under consideration.[5] It was not essential, therefore, that the Congress specifically define a term which had been the recipient of recent judicial construction. On the other hand, the use of the word "production" (for commerce), required that the Congress be more explicit in order to accomplish the result for which the legislation was intended. Neither in the Congressional debates, in the Act itself, nor in the expressed policy of the Act, is found any intimation of an intention to differentiate, as to coverage, between the applicability of the terms "in commerce" and "production for commerce", as the Courts below have construed the Act.

The decisions of this Honorable Court, construing the Fair Labor Standards Act, lend credence to the proposition that the Act is not to be restricted as has been held by the Courts below in this cause. *Overnight Transportation Co.* v. *Missel,* 62 Sup. Ct. 1216 (1942); *Kirschbaum* v. *Walling, supra.* In *Walling* v. *Jacksonville Paper Co.,* 63 Sup. Ct. —, decided on January 18, 1943, this Court said: "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce".

The lower Courts have likewise so held. *Lorenzetti* v. *American Trust Co.,* 45 Fed. Supp. 128, on appeal to the 9th Circuit; *Stoicke* v. *First National Bank of the City of New York,* 5 Wage Hour Rept. 560 (Sup. Ct. N. Y. App.

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[5] See 83 Cong. Rec., 75th Cong. 3rd Sess. Pt. 7, p. 7434 and Pt. 8, pp. 9168-71. See also Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), Pt. 1, pp. 42-43.

Div. 1st Dep't 1942); *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. (2d) 655, 10th Cir.; *Fleming* v. *American Stores Co.,* 42 Fed. Supp. 511, on appeal to the 3rd Cir.; *Mortenson* v. *Western Light & Telephone Co.,* 42 Fed. Supp. 319; *Steger* v. *Beard & Stone Electric Co.,* 4 Wage Hour Rept. 411; *Spinner* v. *Waterways Fuel & Dock Co.,* 41 N. E. (2nd) 144 (Ohio, 1942); *Walling* v. *Helena-Glendale Ferry Co.,* decided December 23, 1942 by the 8th Circuit Court, not yet reported. See also *Pickett* v. *Union Terminal Co.,* 33 Fed. Supp. 244, reversed on other grounds in 118 F. (2d) 328, affirmed in 315 U. S. 386; *Morgan* v. *Atlantic Coast Line R. R. Co.,* 32 Fed. Supp. 617; *Williams* v. *Atlantic Coast Line R. R Co.,* 3 Wage Hour Rept. 82, holidng that maintenance-of-way employees of a railroad are engaged in interstate commerce and are covered by the provisions of the Fair Labor Standards Act.

Indeed, this Honorable Court had decided a case under the Federal Employers Liability Act the facts of which are nearly parallel to those in this case. In *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, 103-104, the Court found that a cook employed in preparing and serving meals for a maintenance-of-way crew, following the crew along the lines of the railroad, was "engaged in commerce" within the meaning of the Federal Employers Liability Act because he was employed "* * * no doubt with the object and certainly with the necessary effect of forwarding their work by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had * * *". The labor done by the cook in the *Smith* case, the conditions under which it was performed and the position of that employee generally were identical with the labor done, the conditions under which it was performed and the position of the petitioner in this case.

The sole test to be applied in determining coverage under the Fair Labor Standards Act, as under other statutes governing interstate commerce and requiring that the employee be engaged "in commerce" is whether the work of the employee facilitates or promotes interstate commerce; whether there is such a close and substantial relationship between the work performed by the employee and interstate commerce itself that the former is, in effect, a part of such commerce. This test, often applied, has recently received the approbation of this Honorable Court. In *Overstreet* v. *North Shore Corp. supra,* this Court, in reversing the decision of the Fifth Circuit Court of Appeals, held that the employees of a company operating a toll road, lying entirely within the State of Florida, were engaged in interstate commerce and were entitled to the benefits of the Act because their work was essential to the continuation of interstate commerce. The decision of the Circuit Court was based upon the assertion that the work of these employees merely "affected" interstate commerce and therefore could not come within the ambit of the Fair Labor Standards Act. This Honorable Court, in reversing that holding, pointed out that the practical test announced in *Pederson* v. *Delaware, Lack. & West. R. R. Co.,* 229 U. S. 146, should apply and that "* * * those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' * * *. And the same is true of operational employees whose work is just as closely related to the interstate commerce".

Further, answering the contention that the respondent in that case was not "engaged in commerce but only in providing facilities which those engaged in commerce may use", this Court "did not regard (the) objection well taken".

This Court, in the *Overstreet* case, cited with approval the decision in *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250

U. S. 101, a case on which petitioner herein relies; and noted the similarity between the aims and the applicability, as to coverage, of the Federal Employers' Liability Act and the Fair Labor Standards Act of 1938.

In another recent case, decided by this Honorable Court on February 1, 1943, the argument that the interposition of an independent contractor changes the status of the employee, insofar as coverage was concerned, was specifically rejected. *Pederson* v. *Fitzgerald Construction Co.* It will hardly be denied that the applicability of Sections Six and Seven of the Fair Labor Standards Act depend entirely upon the nature of the work done by the employee and not upon the nature of the employer's business. *Kirschbaum* v. *Walling,* 62 Sup. Ct. 1116 (1942); *Overstreet* v. *North Shore Corp., supra; Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. —, 87 Adv. Sheet 99; *Walling* v. *Jacksonville Paper Co.,* 63 Sup. Ct. —, decided January 18, 1943. The position, therefore, that the Fair Labor Standards Act does not apply to petitioner merely because he was employed by an employer other than the railroad company itself is, it is submitted, in the light of recent decisions of this Court, without merit.

B. Petitioner Was Not Engaged in a "Service Establishment" and the Exemption of Section 13 (a) (2) of the Act Does Not Apply to Respondent's Business.

The respondent has not affirmatively plead the defense of Section 13 (a) (2) of the Act [6] and the defense, if any it is, is therefore not available to it. *Cooper* v. *Gas Corp. of Michigan,* 4 Wage Hour Rept. 550 (C. C. Mich., Mason County, 1941); *Thornberg* v. *E. T. & W. N. C. Motor Transp.*

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[6] Section 13 (a) (2): "The provisions of sections 6 and 7 shall not apply with respect to • • • (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce • • •".

Co., 157 S. W. (2d) 823 (Tenn. 1940); *Pyron* v. *Arnold*, 21 S. E. (2d) 461 (Ga. 1942); Cf. *McKelvey* v. *U. S.*, 260 U. S. 353, 357. Furthermore, the respondent has not shown, as is required of one who relies upon an exemption from a remedial statute, that the activities are "within the words as well as within the reason" for the exemption. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56; *Bowie* v. *Gonzalez*, 117 F. (2d) 11.

However, both the District Court and the Circuit Court of Appeals touched upon the matter of the exemption and the petitioner therefore deems it not improper to outline the reasons why, had the exemption been properly plead, it would not be applicable to the respondent's business.

Section 13 (a) (2), granting an exemption, is to be strictly construed as against the party claiming such exemption. *Fleming* v. *Hawkeye Pearl Button Co., supra; Bowie* v. *Gonzalez, supra.* The respondent, in order to bring himself within this exemption, must assert that the commissary car in which the petitioner performed his duties was and is akin to a public restaurant. It is readily admitted that a restaurant, engaged in preparing and serving meals to the general consuming public, in competition with other like establishments for the public's trade, is entitled to the exemption of Section 13 (a) (2). Both lawyers and laymen consider it a service establishment—one which renders a service to the general public. Placing the label of "restaurant" upon a commissary car, however, does not make it so. *Nomina mutabilia sunt, res autem immobiles.*

A service establishment is one "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods". *Fleming* v. *Kirschbaum*, 124 F. (2d) 567, affirmed 62 S. Ct. 1116 (1942); and one wherein the "principal activity—is to furnish services to the con-

suming public" (Ibid.). It is established that the commissary car here did not sell meals to the general consuming public (R. 15, 16), and that it was used only by the employees of the railroad (R. 15, 16).

Restaurants are located at points easily accessible to the general public; they cater to the passers-by. Commissary cars are operated, as was the one in which the petitioner performed his duties, only for the maintenance-of-way crew, whom the car follows along the railroad line. Restaurants advertise, belong to various trade Associations, seek the trade of travelers, transient persons and the general public. Commissary cars do not (R. pp. 15, 16). It is a matter of common knowledge that there are vast distances, uninhabited, along railroad lines, particularly in the western and southwestern States, where it would be a physical impossibility for maintenance-of-way crews to receive board and lodging except through the use of a commissary car. These cars are, in fact, a necessary adjunct to the equipment and to the work of these maintenance-of-way crews. *Philadelphia, B. & W. R. R. Co.* v. *Smith, supra.*

It has been held that cookhouses in lumber camps do not fall within the exemption of Section 13 (a) (2). *Womack* v. *Consolidated Timber Co.,* 132 Fed. (2nd) 101, 9th Cir. And it may be conservatively stated that the position of the cookhouse in a lumber camp and that of a commissary car on a railroad line are, for purposes of the exemption, similar.

The fact that the petitioner was employed by an independent contractor, respondent herein, rather than by the railroad company itself does not change his status. His duties, the results of his efforts and the conditions under which the work is performed are exactly the same, whether he be employed by the respondent or by the railroad company. If the petitioner were employed directly by the railroad company, he would not have been engaged in a "serv-

ice establishment''. If, by the simple expedient of contracting with an independent contractor for the performance of such work, it were possible to avoid the requirements of such legislation, a great many functional operations in interstate commerce, as well as jurisdiction of the proper authority thereover, could be completely avoided. It is submitted that such was not the intent of the Congress and this Court has correctly so indicated in the decision in *Pederson* v. *Fitzgerald Construction Co.*, 63 Sup. Ct. — decided February 8, 1943.

But assuming, for the purpose of the point, that the commissary car were within the exemption of a ''service establishment'', respondent stands in no better position, for the requirement that the ''greater part of * * * the * * * servicing * * *'' must be in intrastate commerce is not met. The railroad company being engaged in interstate commerce (R. p. 20), the work of the maintenance-of-way employees and that of the cook being a part of such commerce, it is obvious that the greater part, if indeed not all, of the commissary car's service is in interstate commerce. If the ''service'' rendered is part of the railroad's interstate operations, the greater part of such servicing is in interstate commerce. See *Fleming* v. *Arsenal Building Corp.*, 125 Fed. (2nd) 278, 2nd Cir., affirmed 62 Sup. Ct. 1116 (1942).

Conclusion.

The decision of the Court below is in conflict with the decisions of this Honorable Court in *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101; *Overstreet* v. *North Shore Corp.*, 63 Sup. Ct. — and *Pederson* v. *Fitzgerald Construction Co.*, 63 Sup. Ct. —. It is also in conflict with the decision of the Ninth Circuit Court in *Womack* v. *Consolidated Timber Co.*, 132 Fed. (2nd) 101 and the decision of the Court below raises an important question of federal law

which has not been, but should be, settled by this Honorable Court.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

LEON C. LEVY,
Attorney for Petitioner.

LEON C. LEVY,
First Nat'l Bank Bldg.,
Houston, Texas.

HARRY DOW,
Attorney for Petitioner.

HARRY DOW,
First Nat'l Bank Bldg.,
Houston, Texas.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 787

L. McLEOD, *Petitioner,*

v.

M. C. THRELKELD, ET AL.,
DOING BUSINESS AS
THRELKELD COMMISSARY COMPANY, A PARTNERSHIP,
Respondents

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN P. BULLINGTON,
Attorney for Respondent

ALPHA LAW BRIEF CO., HOUSTON

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 17-22) is reported in 46 F. Supp. 208. The opinion of the Circuit Court of Appeals (R. 31-34) is reported in 131 F. (2d) 880.

Jurisdiction

The judgment of the Circuit Court of Appeals was en-

tered on December 9, 1942 (R. 35). The petition for a writ of certiorari was docketed on March 4, 1943. The jurisdiction of the Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended.

Questions Presented

1. Whether a cook, employed by respondent, preparing and serving meals to some, but not all, of a gang of maintenance-of-way employees of an interstate railroad is engaged "in commerce" within the meaning of the Fair Labor Standards Act.

2. Whether such a cook is employed in a "service establishment" within the meaning of Section 13(a)(2) of the Fair Labor Standards Act.

Statement

Respondent is a partnership engaged in the business of providing meals for certain employees of railway companies commonly known as maintenance-of-way employees who perform work upon the right of way lines and tracks of railway companies (R. 11). Respondent has a contractual arrangement with the Texas and New Orleans Railroad Company under which it is permitted to operate a car on the rails of the railroad company for the serving of meals to such of the company's right of way employees as desire to avail themselves of the service. While many of the maintenance of way employees board in respondent's cars others do not (R. 12). In addition respondent's meal service is available to other railroad employees (R. 12) as well as to other persons who are not employees of the railroad and who may desire such service (R. 15). In addition to furnishing meals to some of the maintenance-of-way employees of the railroad, respondent rents bedding to such employees as desire and pay for it

(R. 12). Petitioner worked as a cook employed in one of respondent's cars and his only duties were to cook and serve meals in the dining car and keep the kitchen and car clean and suitable for the serving of meals and to keep an account of the meals served (R. 13). Respondent worked exclusively at points within the State of Texas (R. 13).

There is no generally accepted practice in the railroad industry in the United States with respect to the furnishing of meals to maintenance-of-way employees. On some railroads the maintenance-of-way employees are left entirely to their own devices for the procuring of meals and on the other extreme some railroads themselves furnish meal service to such employees. In other cases, as here, the railroad permits outsiders to come on its property for the purpose of serving meals to the maintenance-of-way employees (R. 14).

Both the District Court and the Circuit Court of Appeals found that petitioner was not engaged "in commerce" within the meaning of the Fair Labor Standards Act and therefore found it unnecessary to pass upon whether petitioner was employed in a service establishment within the meaning of Section 13 (a) (2) (R. 17-22, 31-34).

Argument

Petitioner asserts that this case is ruled by the recent decisions of the Court in OVERSTREET v. NORTH SHORE CORP., No. 284, October Term, 1942, and PEDERSEN v. FITZGERALD CONSTRUCTION CO., No. 396, October Term, 1942. In the OVERSTREET case this Court held that operating and maintenance employees of an interstate toll road company were engaged "in commerce" within the meaning of the Act and in the PEDERSEN case the Court held that employees of an independent contractor doing construction and maintenance work on an interstate railroad were engaged "in commerce" within the meaning of the Act. Although none of the em-

ployees in these cases was directly engaged in interstate transportation, it was the view of the Court that the work performed by them was so closely connected therewith as to justify treating them as if they were directly engaged therein. In this case, in order to hold that petitioner was engaged "in commerce," the Court must take an additional step away from any direct participation in that commerce since admittedly petitioner had no direct connection with the repair or maintenance of the railroad but only furnished a service to some, but not all, of those who did. His work was done wholly within the State of Texas—he cooked and served meals, did the necessary washing and cleaning in connection therewith, and looked after the bedding which was rented by some of the railroad employees from respondent. He did not work on any subject of interstate commerce nor on any instrumentality of such commerce. The most that can be said is that he performed personal services for individuals who were engaged in working on an instrumentality of interstate commerce. Petitioner urges that he must be treated as being engaged "in commerce" because his work is essential to the carrying on of that commerce. The argument runs something like this: (1) Railroad tracks are essential for the carrying of goods by railroad in interstate commerce; (2) it is essential that the tracks be kept in repair which requires the services of maintenance employees so that they likewise become essential to the carrying on of interstate commerce and are properly held to be engaged therein; (3) food is essential to the essential men who maintain the essential tracks and since a cook is essential to the preparation of the essential food the cook becomes essential to carrying on interstate commerce and is therefore to be regarded as himself a part of interstate commerce; (4) the Court has taken step No. 2 in the OVERSTREET and PEDERSEN cases and therefore it should take step No. 3 in this case. Apart from the fact that this type of argument could be used to bring the entire

range of human activities within the coverage of the Act, which admittedly was not intended by Congress, it is contrary to the stipulated facts. While it is true that petitioner did follow a crew of maintenance-of-way workers, it cannot properly be said that his activities were either necessary or essential to the maintenance-of-way workers in the performance of their duties. If petitioner's duties were essential to the carrying on of the work of the maintenance-of-way employees then all of such employees would necessarily have had to avail themselves of such services. It is stipulated, however, that some of these employees did not use the service at all, apparently preferring to get their food elsewhere. It is further stipulated that on some railroads all of the maintenance-of-way employees are left to their own devices for getting food whereas if services such as are offered by respondent were necessary or essential to the conduct of maintenance-of-way operations all railroads would necessarily have to furnish such services in one way or another. Evidently some of the maintenance-of-way employees felt that respondent's service was useful and desirable else they would not have used it, but it is equally evident that such services were not necessary or essential since some of the maintenance-of-way employees rejected it but still managed to carry on their work. What petitioner's argument overlooks is that while it is necessary and essential that maintenance-of-way employees be fed it is by no means necessary or essential that they be fed by respondent or petitioner, its employee. So far as concerns his relation to interstate "commerce" or "transportation" petitioner is in no different situation from the operators of the restaurants and hamburger stands which are to be found at the entrance of practically every big railroad yard or shop in the country.

Not only are petitioner's activities beyond the letter of the Act—they are entirely outside its stated purpose and intent.

This Court in UNITED STATES v. DARBY, 312 U.S. 100, 115 (1941), said:

> "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce shall not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the state from and to which the commerce flows."

The wages and hours of petitioner cannot in anywise affect the situation with which Congress sought to deal in the Fair Labor Standards Act. Respondent is not itself engaged in "commerce or in the production of goods for commerce" nor does it form any part of any industry engaged therein either directly or indirectly. While the wages paid to and hours worked by petitioner may very well have affected the cost of the meals served by respondent, the cost of these meals did not in any way affect the cost of any article moving, or intended to move, in interstate commerce nor does the cost of the meals in any way affect the wages or hours of the consumers of the meals who may themselves be engaged in commerce. The railroad whose employees are served pays respondent nothing and respondent's only relation to the railroad is that it has a contractual right, granted by the railroad, permitting it to come on railroad premises to furnish meals to such of the railroad employees as desire to purchase them. So far as concerns the evils which Congress sought to correct by the Act, the wages and hours of petitioner are of no more effect than the wages and hours of any other cook in any other restaurant where railroad employees happen to eat.

In the OVERSTREET case the court intimated that court decisions dealing with the coverage of the Federal Employers Liability Act would be given persuasive, if not controlling,

effect in determining the coverage of the Fair Labor Standards Act. It is true, as the court said, that both acts are "* * * aimed at protecting commerce from injury through adjustment of the master-servant relationship * * *," but they deal with entirely different aspects of that relationship and the evils sought to be corrected by the enactment of the two laws were wholly different. Nothing is better settled than that the courts will, in delimiting the coverage of an act of Congress, give great, if not controlling, consideration to the evils intended to be corrected by the legislation. APEX HOSIERY CO. v. LEADER, 310 U.S. 469, 489 (1940). If effect is to be given to this well settled rule of statutory construction, then the danger of indiscriminately applying decisions under the Federal Employers Liability Act to cases arising under the Fair Labor Standards Act is manifest and the present case throws it into bold relief. To paraphrase a statement of the late MR. JUSTICE HOLMES, the decisions of courts, in matters of this kind, are but the pricking of points through which a line of demarcation between coverage and noncoverage may finally be drawn. Considerations of congressional purpose may quite properly cause the courts in considering the same set of facts, under different statutes, to prick the points at different places even though the naked words of the two statutes delimiting their coverage may be the same.[1] It is in the light of these considerations that the

[1] It may be observed here that the decisions of the courts dealing with the coverage of the Federal Employers Liability Act prior to the 1939 amendment are in a state of considerable confusion. See the cases collected in 10 A. L. R. 1184; 14 A. L. R. 732; 24 A. L. R. 634; 29 A. L. R. 1207; 49 A. L. R. 1339; 65 A. L. R. 613; 77 A. L. R. 1374; and 90 A. L. R. 846. See particularly the editorial comments in 10 A. L. R. and 77 A. L. R. While there is no conflict among the courts with reference to the central core of coverage, when you come to the outer fringes you find no single line marked by the decisions but a whole series of lines crossing and recrossing each other without apparent rhyme or reason. While there is considerable conflict even in the decisions of the Federal courts, there is even greater conflict in the decisions of state courts. Perhaps some of the

decision in PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD CO. v. SMITH, 250 U.S. 101 (1919), should be viewed. Smith was an employee of the railroad company and was a member of a gang of bridge carpenters. He ran what was called a "camp car," furnished and moved by the railroad, in which all members of the gang, including Smith, ate, slept, and lived. Smith was injured when a locomotive ran into the camp car while it was standing on a siding and at a time when Smith was preparing a meal for himself and the other members of the gang. These facts, together with the fact that Smith was subjected to the same risks of injury as the other members of his gang, led the court to hold that he was employed in interstate commerce within the meaning of the Federal Employers Liability Act. Stated in another way, the court held that Smith fell within the class of those intended to be protected by Congress in the enactment of the Federal Employers Liability Act. Apart from the questionable authority of this case, which will hereafter be discussed, it is submitted that it is distinguishable from the present case in the following respects: (1) In the SMITH case the employee was at least arguably within the class sought to be protected by Congress whereas petitioner here is clearly not. (2) The relationship between Smith and the track workers was much closer than that between petitioner and the track workers here. (3) Smith was an employee of the railroad and a member of the track workers gang. Petitioner was not a member of the track workers gang and had no relation to the railroad. (4) The car in which Smith worked was the home of himself and the other members of the gang where they ate, slept, and lived. Petitioner merely prepared and served

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conflict is in the decisions of the state courts, at least, may be explained by considerations of social policy flowing from the great variety of state laws applicable to railroad employees under some of which the employer would be better off under the state act and under others he would be better off under the Federal act.

meals in his car and rented bedding for use elsewhere. (5) All members of Smith's gang ate, slept, and lived in the camp car, thus indicating it was a necessary part of their work. In this case some members of the railroad maintenance gang ate the meals prepared and served by petitioner while others ate elsewhere, indicating a far less integral connection between petitioner's service and that of the maintenance workers than the connection reflected in Smith's case.

The SMITH case, at the time it was decided, was recognized as a distinct extension of the previously recognized coverage of the Act. 6 Va. L. R. 66 (1919). Prior to the court's decision in the OVERSTREET case it had stood on the books for twenty-three years without being once cited by this Court although in one opinion it was listed in a footnote along with other cases as having been considered by a lower court whose decision was reversed. INDUSTRIAL COMMISSION v. DAVIS, 259 U.S. 182, 184 (1922). The opinion in the SMITH case was handed down during a period when the coverage of the Federal Employers Liability Act was being extended beyond what this Court later found to be proper limits. In the earlier cases interpreting the Federal Employers Liability Act it was given rather a restricted application [e.g., SHANKS v. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., 239 U.S. 556 (1916)] but gradually a looser interpretation came to be given to the Act until a series of cases decided at the October Term, 1931, called attention to the fact that the coverage of an employee by the Act was to be tested by his relation to interstate "transportation" and not interstate "commerce." CHICAGO & NORTHWESTERN RAILWAY CO. v. BOLLE, 284 U.S. 74 (1931); CHICAGO & EASTERN ILLINOIS RAILROAD CO. v. INDUSTRIAL COMMISSION, 284 U.S. 296 (1932); NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. v. BEZUE, 284 U.S. 415 (1932). In the BOLLE case the

unanimous court expressly condemned the use of the test of the employee's relation to interstate "commerce" (which was the sole test used in the SMITH case) and in the case of CHICAGO & EASTERN ILLINOIS RAILROAD CO. v. INDUSTRIAL COMMISSION the court overruled ERIE RAILROAD CO. v. COLLINS, 253 U.S. 77, and ERIE RAILROAD CO. v. SZARY, 253 U.S. 86, decided in 1920 and relied upon by respondent in that case. The COLLINS and SZARY cases were decided within a year of the SMITH case and both of them, as did the SMITH case, adopted the test of the employee's relation to "commerce" instead of to "transportation." In CHICAGO & EASTERN ILLINOIS RAILROAD CO. v. INDUSTRIAL COMMISSION the employee involved was engaged in hoisting coal into a chute to be taken therefrom by locomotive engines principally employed in the movement of interstate freight. The court held that this employee was not within the coverage of the Federal Employers Liability Act and this holding, it is submitted, cannot be reconciled with the earlier holding in the SMITH case. An engine pulling freight cars in interstate commerce is a direct instrumentality of interstate transportation and an employee who prepares the fuel to be consumed by such locomotive is obviously more directly connected with interstate transportation than is an employee who prepares fuel for the bodies of men who are not themselves instrumentalities of interstate commerce although they expend energy in working on such instrumentalities. Since the two decisions cannot be reconciled, the SMITH decision must be taken to have been overruled by the later decision.

Neither the letter nor the spirit of the Fair Labor Standards Act nor any decision of this Court requires a holding that petitioner comes within its coverage. The decisions below were correct and are not in need of further review by this Court.

II.

In this Court petitioner asserts for the first time that respondent may not claim exemption under Section 13(a)(2) of the Act because not specifically referred to in its pleadings. The "service establishment" issue was clearly raised by the facts introduced in evidence (R. 11-16), was fully briefed and argued by both petitioner and respondent in the trial court and in the Circuit Court of Appeals, and was considered by both courts although a decision of the question was not required because of the holding that petitioner was not engaged in "commerce" within the meaning of the Act. The trial court stated that:

> "Plaintiff affirms and Defendants deny that the facts bring them within the scope of Sections 6 and 7 of the Act. Defendants say, however, that if they do, they are exempt under Section 13 of the Act. This, Plaintiff denies" (R. 17).

The Circuit Court of Appeals stated that:

> "Our view of the case makes it unnecessary to express an opinion on the persuasive contention that under any view of the case appellee was a retail service establishment doing a wholly intrastate servicing business, and therefore within the exemption contained in Section 13(a)(2) of the Act" (R. 34)

This contention of petitioner is wholly without merit apart from the question of the necessity of specifically pleading Section 13(a)(2). Rule 15(b) of the FEDERAL RULES OF CIVIL PROCEDURE provides that:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

See also LIENTZ v. WHEELER, 113 F. (2d) 767 (C.C.A., 8th, 1940); LOW v. DAVIDSON MANUFACTURING CO., 113 F. (2d) 364 (C.C.A., 7th, 1940); MARTIN v. CHANDIS SECURITIES CO., ET AL., 128 F. (2d) 731 (C.C.A., 9th, 1942).

While it is not believed that there is any reasonable basis either in the letter or spirit of the Act for holding that petitioner is covered by the Act at all, it is nevertheless submitted that if the Act be held to apply to him then his work falls clearly within Section 13 (a) (2) of the Act exempting any "employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." It was stipulated that all of respondent's servicing was performed within the State of Texas so that the only question is whether petitioner's work was in a "service establishment." It is believed that respondent's business of feeding individuals is the very archetype of a "service establishment." Respondent, according to the stipulation, furnishes meal "service" and it is petitioner's duty to cook and "serve" meals and to keep the premises suitable for the "serving" of meals. You cannot, indeed, describe respondent's business or the work performed by petitioner without using the words "serve," "service," or some form thereof. The Wage-Hour Administrator himself in the latest revision of Interpretative Bulletin No. 6, par. 24, says:

> "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption, are: restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; * * * ."

On the face of it, therefore, it would seem that respondent's business clearly falls within the general description of a "service establishment" adopted by the Administrator himself. Despite this fact the Administrator's position with respect to the specific type of establishment here involved has been a changing one. In an Opinion Letter dated Sept. 16, 1940, it

was ruled that cooks assigned to railroad construction crews were exempt as being employed in a "service ~~department~~ establishment" although the cooks were employees of an interstate railroad and the meals were furnished to the men at the expense of the railroad company. A similar ruling was made in an Opinion Letter dated March 10, 1941, relative to employees serving meals in a mobile outfit owned and operated by a telegraph company for the furnishing of meals to the telegraph company's employees engaged in repairing their interstate telegraph lines. In a revision of Interpretative Bulletin No. 6 made in June, 1941, the Administrator for the first time took the position that "employees working on a traveling commissary or camp car which goes along with the working construction crew on a railroad or telegraph right of way are not engaged in a retail or service establishment for the purposes of the exemption." This ruling is made in paragraph 40 of the amended bulletin and is made without any discussion of the reasons therefor other than to refer to the ruling contained in the same paragraph with respect to cook houses in lumber camps. The ruling with regard to these cook houses is made on the basis that they are in isolated localities and are operated by the lumber companies as adjuncts to the companies' principal business. According to the Administrator they are "as much a part of the principal business as the tool sheds" and that "failure to provide the facilities would make continued operations difficult." The ruling in Paragraph 40 is concerned solely with situations where the employer furnishes the meals and the holding is that the employer may not separate this part of his business from the principal business and treat it as a "retail or service establishment." The ruling is a limitation on the ruling contained in Paragraph 39 of the same Interpretative Bulletin to the effect that where a company operates a cafeteria in a separate building for the convenience of its employees but the em-

ployees pay cash for what they eat and others may purchase food in the establishment the employer is entitled to separate it from the rest of his business and treat it as a "service establishment."

A careful reading of Paragraphs 39 and 40 of Interpretative Bulletin No. 6 makes it perfectly clear that the ruling is based solely on the proposition that the eating facilities are operated by the employer as a part of its principal businesss and without which its principal business could scarcely be conducted. In short, the holding is based on the proposition that a meal house operated by the employer for his employees is not itself an "establishment" of any kind—service or otherwise—but is simply part and parcel of the employer's business of manufacturing lumber or some other commodity.

While it is believed that the original ruling of the Administrator, adhered to for over two years, is the correct one, no argument is made on that point since it is clear that respondent falls outside the second ruling above referred to. The furnishing of meals by respondent is not merely an adjunct to or a part of its principal business but *is* its business and its sole business. The only "establishment" which it has is the establishment in which petitioner worked and there is no need for a separation of the operations of a single employer since respondent is a separate and distinct organization and wholly independent of the railroad company.

While it is not believed that the interpretations of the Administrator relied on by petitioner are applicable to this case, it is submitted that even if they did purport to cover the instant situation they are of such nature as to demand no particular attention from this Court. The brief will not be lengthened by discussion of the many cases in which the courts have refused to follow the Administrator's rulings with respect to what is a "service establishment" since the Court is undoubtedly familiar with them. In this particular situation,

if the Administrator's ruling be held applicable to petitioner's work, the general rule with respect to the dignity attached to administrative rulings by the courts is inapplicable since the administrative interpretation has not been uniform. BURNETT v. CHICAGO PORTRAIT CO., 285 U.S. 1, 16 (1932).

The decision in WOMACK v. CONSOLIDATED TIMBER CO., 132 F. (2d) 101 (C.C.A., 9th, 1942), cited by petitioner, requires no separate consideration since it is based on the Administrator's ruling above discussed. In the WOMACK case the trial court also followed the Administrator's ruling but in the course of his opinion (43 F. S. 625, 630) he used the following language which is particularly applicable here:

> "There are several factors pertinent to each of these establishments. A cookhouse is a restaurant or roadside diner and, therefore, a typical service establishment. A service was rendered in a physically separate establishment where meals were sold at retail to, and the facilities of the establishment were placed at the disposal of, private individuals for direct consumption and use. Persons not in the employ of the defendant or companies under contract with defendant were served upon the same terms as persons so employed, except that the price was higher for the former. Employees of logging companies under contract with defendant were served. There was no requirement that defendant's employees patronize either cookhouse. Those employees who were served in the cookhouse were charged a price for the meals eaten, which in the aggregate sustained the establishment but was not above cost. These payments were deducted from the employees' wages.
>
> "Obviously, if either of these cookhouses were operated by an entirely independent concern, it would be designated as a restaurant and would fall in the class of a retail or service establishment. Such a restaurant would do the majority of its selling or servicing in interstate commerce, irrespective of the fact that meals were sold

> to the employees of one company only. This factor highlights a fundamental problem. The timber worker is a member of the public. As to meals, he is himself a consumer and purchases food at retail as any other member of the consuming public. This is true whether he is employed or unemployed. The fundamental characteristic of a restaurant is sale at retail to the ultimate consumer in intrastate commerce."

The court's description above quoted fits respondent's situation precisely. It was ready, able, and willing to serve anyone who desired to be served even though this particular petitioner had not had occasion to serve any outsider within the two years prior to the filing of the suit. There was no requirement that the employees of the railroad company eat with respondent but those who did were charged for what they received. The railroad employees themselves paid for the food they ate. In such circumstances, said the court, when the cookhouses [commissary cars] are operated by independent concerns they are unquestionably exempt as "service establishments" irrespective of any question of whether the employees are engaged in commerce, in the production of goods for commerce, or in any occupation necessary for the production of goods for commerce.

In summary it may be said that by all of the ordinary tests, including the general test set up by the Administrator himself, petitioner was working in a "service establishment" and the only point against his being so considered is a vacillating interpretation by the Administrator which on its face does not cover petitioner at all since the Administrator's interpretation did not even purport to apply to the employees of an independent operator. It is respectfully submitted that if petitioner came within the Act at all his work was exempt as being performed in a "service establishment" and the decisions below may be sustained on that ground.

Conclusion

Respondent is engaged in the business of furnishing meals to all who will take them and such service is in every case performed within the confines of a single state. Respondent's service, it is true, is in the greatest part rendered to employees of interstate common carriers but in this regard respondent is legally in no different situation from a restaurant owner whose restaurant happens to be located adjacent to large railroad yards with the result that practically all of his trade is from employees of railroads engaged in interstate commerce. Respondent's activities and the wages and hours of its employees in no wise can affect the price of goods moving in interstate commerce or have any effect, direct or indirect, upon the evils which Congress sought to correct by the enactment of the statute. Neither the letter nor the spirit of the Act shows any intent on the part of Congress to cover the work performed by petitioner and even if it did the congressional exemption of employees employed in "service establishments" would clearly apply to petitioner.

The petition for certiorari should be denied.

Respectfully submitted,

JOHN P. BULLINGTON,
Attorney for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 787

L. MCLEOD, PETITIONER

v.

M. C. THRELKELD, J. H. THRELKELD, AND M. C. THRELKELD, JR., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae.

OPINION BELOW

The opinion of the District Court (R. 5–10) is reported in 46 F. Supp. 208. The opinion of the Circuit Court of Appeals (R. 11–13) is reported in 131 F. (2d) 880.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1942. A petition for a writ of certiorari, and a motion for leave to proceed *in forma pauperis,* were filed on March 4, 1943, and were granted on April 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether a cook who prepares and serves meals to maintenance-of-way employees of an interstate railroad, in a cook-and-dining car which travels along the railroad's rails, is engaged in commerce within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

The case was presented to the District Court on a stipulation of facts which may be summarized as follows:

Respondents, partners in the Threlkeld Commissary Company, have a contract with the Texas and New Orleans Railroad Company and with other railroad companies in several states (R. 1, 3, 7) to furnish meals and bedding to each railroad company's maintenance-of-way employees. The Texas and New Orleans Railroad Company is a common carrier engaged in interstate transporta-

tion. The Railroad Company's employees boarded by respondents are engaged in maintaining the railroad lines in proper condition for interstate transportation. Most, but not all, of such employees board with the respondents at prices which vary in accordance with the type of gang to which they belong. The Railroad Company is authorized in writing by the employees to make deductions from their wages and pay the respondents for the board and bedding furnished. (R. 1–2, 5–6.)

Meals served by respondents to the railroad maintenance-of-way employees are prepared and served in a cook-and-dining car. The car runs on the railroad's tracks and travels with a particular gang or outfit. Each car is in charge of a cook whose duty it is to cook and serve meals and to keep the car clean. Petitioner, during the period involved in this suit, worked exclusively at points along the railroad lines within Texas and did not go to other states (R. 2). If the maintenance-of-way employees are required to perform emergency work, the cook must follow the crew to the point at which the work is done. Petitioner was employed by respondents as a cook from July 1939 to May 1941, and performed the duties above described. (R. 2, 6.) [1]

[1] Some question was raised concerning whether petitioner served meals to persons other than railroad employees. The court found (R. 3–4) that although occasionally he did, this occurred so infrequently that for purposes of the cases petitioner would be deemed to have served only railroad employees.

The District Court held that although the Railroad Company, and its employees to whom petitioner furnished meals, were engaged in commerce (R. 8), neither petitioner nor respondents were so engaged within the meaning of the Act (R. 10). It therefore entered judgment for respondents (R. 10–11). The court below affirmed (R. 13).

ARGUMENT

A cook, employed to prepare and serve meals to railroad maintenance-of-way employees who are engaged in interstate commerce, is engaged in such commerce within the meaning of the Act, and his work is not exempt under Section 13 (a) (2)

A. Petitioner is "engaged in commerce" within the meaning of Sections 6 and 7 of the Act

This Court, in *Overstreet* v. *North Shore Corp.*, No. 284, this Term, decided February 1, 1943, held that in the decisions under the Federal Employers' Liability Act "A practical test of what 'engaged in interstate commerce' means has been evolved," and stated that there was "no persuasive reason why the scope of employed or engaged 'in commerce' laid down" in the Federal Employers' Liability Act cases "should not be applied to the similar language in the Fair Labor Standards Act."

Accordingly, *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, would seem decisive here. Its facts are virtually identical to those presented in the case at bar. In the *Smith* case, a mess cook preparing and serving meals for a railroad main-

tenance-of-way gang was held to be employed in interstate commerce within the meaning of the Federal Employers' Liability Act. As in the instant case, the cook in the *Smith* case worked in a railroad camp car which travelled to portions of the railroad company's lines with a crew of bridge carpenters engaged in making repairs. This Court pointed out that the cook's duties had the effect of forwarding the work of the railroad gang "by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had." Therefore "he [the cook] was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." 250 U. S. at 103–4.

No valid distinction can rest on the circumstance that in the *Smith* case, the employee involved was an employee of the railroad company. Cf. opinion below (R. 12). This Court held in *Pedersen* v. *J. F. Fitzgerald Construction Co.*, No. 396, this Term, decided February 8, 1943, petition for rehearing denied and judgment amended, March 8, 1943, that the decision in the *Overstreet* case applied to employees of a *contractor* engaged in the reconstruction and repair of railroad bridges. As this Court has repeatedly ruled, "The nature of the employer's business is not determinative, * * * the application of the Act depends upon the character of the employees'

activities." *Overstreet* v. *North Shore Corp., supra; Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* No. 336, this Term, decided January 18, 1943; *Warren-Bradshaw Drilling Co.* v. *Hall,* No. 21, this Term, decided November 9, 1942.

The assumption by the Court below that the term "engaged in commerce" is to be construed more narrowly than the term "production for commerce" is mistaken.[2] This Court has held that coverage under the phrase "engaged in commerce" extends "throughout the farthest reaches of the channels of interstate commerce." *Overstreet* v. *North Shore Corp., supra; Walling* v. *Jacksonville Paper Co., supra.* The Court has also indicated that the scope of coverage under this phrase is commensurate with the scope of coverage under the phrase "production for commerce." Almost identical language has been used by the Court in defining the scope of the two terms. In *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525–526, work which "had such a close and immediate tie with the process of production for commerce" as to be "an essential part of it" was held to be "necessary to the production of goods

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[2] Both the Eighth and Ninth Circuit Courts of Appeals have held that cooks employed to prepare and serve meals for employees of lumber companies *producing* goods for interstate commerce are within the coverage of the Act. See *Hanson* v. *Lagerstrom,* 133 F. (2d) 120 (C. C. A. 8); *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101 (C. C. A. 9).

for commerce." Correspondingly, in the *Overstreet* case, the Court held that the term "engaged in commerce" includes work which "is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

B. Respondents' commissary car is not a "service establishment" within the meaning of the exemption provided in Section 13 (a) (2) of the Act

The Court below ruled that its view of the case made it unnecessary to express an opinion on the "persuasive contention" that respondent was a service establishment within the exemption provided by Section 13 (a) (2) of the Act (R. 13). We submit that the contention is not sound.

Section 13 (a) (2) exempts from the wage and hour provisions of the Act "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The commissary car upon which petitioner worked is used exclusively for the benefit of the railroad maintenance-of-way employees and to further the railroad's interstate transportation operations; it falls outside both the letter and purpose of these exemptive provisions.[3] The "service establishment" intended to

[3] The Administrator has expressed the view in Interpretative Bulletin No. 6, Wage Hour Division, United States Department of Labor, paragraph 40, revised June 1941, that employees working on a traveling commissary or camp car, which goes along with the working construction crew on a railroad right-of-way, are not within the exemption. Wage Hour Man. (1942), p. 337.

be exempted is one "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods," and whose "principal activity * * * is to furnish service to the consuming public." *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed 316 U. S. 517.[4] As the Circuit Court

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[4] The legislative history of the Act establishes that the exemption stemmed from a desire to protect small retailers selling directly to the general consuming public. The original bills contained no exemption for retail or service establishments. Section 2 (a) (7) of the Senate Committee Bill (S. 2475), passed by the Senate July 31, 1937, and by the House May 24, 1938, as Section 11 (a) (1), provided an exemption for employees working in a "local retailing capacity." But the apparent source of Section 13 (a) (2) was an amendment offered by Representative Celler excepting "any retail industry, the greater part of whose sales is in intrastate commerce" which he proposed in order to dispel all doubt as to the exemption of "retail dry goods, retail butchering, grocers, retail clothing stores, department stores" (83 Cong. Rec. 7437, 7438). The amendment passed the House but was not enacted.

The exemption, in substantially its present form, appeared for the first time in the confidential Conference Committee prints dated June 10, 11, and 12, 1938, respectively. These drafts excepted "any employee engaged in any retail establishment the greater part of whose selling is in intrastate commerce." In the Conference Committee report dated June 11, 1938, the words "or service" and "or servicing" were added (H. Rept. 2738, 75th Cong., 3d sess.). The explanation of the exemption in the report merely repeated the language of Section 13 (a) (2) (Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, June 2, 1937, p. 32). The Conference Committees version of the bill was adopted by both Houses of Congress on June 14, 1938 (83

of Appeals for the Third Circuit pointed out "typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops" (*ibid.*). Correspondingly, typical "service establishments" are "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like." *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 47 (W. D. Tenn.); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101, 107 (C. C. A. 9).

While an ordinary public restaurant would come within this classification, respondents' commissary car is wholly different. The commissary car is not located at readily accessible sites to attract the patronage of the consuming public and does not serve the general public. It is operated exclusively to provide food for the railroad's mobile work crews and constitutes an integral part of the main business of interstate transportation. It does not function nor is it operated as an ordinary restaurant. It does not cater to the public and it is not in competition with ordinary restaurants. The principal activity of the commissary car

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Cong. Rec. 9178, 9266–9267), three days after the language in question first appeared. The new language provoked no discussion on the floor of either the House or Senate. The absence of expression or comment upon the modification indicates that no far-reaching extension of the original exemption for retail establishments was contemplated by the last-minute addition of the words "or service."

"definitely was not to furnish service to the consuming public, as such, but was to serve the employees" engaged in maintaining the lines of the railroad company. Cf. *Consolidated Timber Co.* v. *Womack, supra,* at p. 107; *Hanson* v. *Lagerstrom,* 133 F. (2d) 120 (C. C. A. 8); see also *Walling* v. *Sondock,* 132 F. (2d) 77 (C. C. A. 5), certiorari denied, No. 683, March 8, 1943.

Even if it be assumed that respondents' commissary car were a "service establishment," the exemption would be unavailable, because the requirement of Section 13 (a) (2) that "the greater part of * * * [the] servicing [be] in intrastate commerce" is not satisfied, despite the fact that services rendered by the commissary car are all performed within Texas. Since the railroad company is engaged in interstate commerce (R. 8) and the work of the maintenance-of-way employees and the cook in the commissary car are part of that interstate commerce, the greater part, if not all, of the car's services is in interstate commerce. See *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526; *Fleming* v. *Arsenal Bldg. Corp.,* 125 F. (2d) 278, 280 (C. C. A. 2), affirmed, 316 U. S. 517.

CONCLUSION

Under the principles of the foregoing decisions, petitioner is engaged in commerce within the meaning of the Act, and is not exempted under Section 13 (a) (2). Therefore, the judgment of

the Circuit Court of Appeals should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

RICHARD S. SALANT,
Attorney.

IRVING J. LEVY
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,
United States Department of Labor.

APRIL 1943.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

SEC. 13 (a) * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

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SUPREME COURT OF THE UNITED STATES.

No. 787.—October Term, 1942.

L. McLeod, Petitioner,
vs.
M. C. Threlkeld, et al., doing business as Threlkeld Commissary Company, a Partnership.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 7, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here for examination a judgment of the Circuit Court of Appeals for the Fifth Circuit, 131 F. 2d 880, which held that a cook, employed by respondents to prepare and serve meals to maintenance-of-way employees of the Texas and New Orleans Railroad Company, is not engaged in commerce under sections 6 and 7 of the Fair Labor Standards Act and therefore not entitled to recover for an alleged violation of that act.[1]

The respondents are a partnership with a contract to furnish meals to maintenance-of-way employees of the railroad, an interstate carrier. The meals are served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. The car is set conveniently to the place of work of the boarders and in emergencies follows the gang to the scene of its activities. Employees pay the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due and pay it over to the contractor. The petitioner worked as cook at various points in Texas along the line of the road during the period in question.

As the extent of the coverage by reason of the phrase "engaged in commerce" is important in the administration of the Fair Labor Standards Act, we granted certiorari, — U. S. —.

1 52 Stat. 1062-63. "Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

. . . . . .

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . ."

In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees "engaged in commerce in any industry affecting commerce" was rejected in favor of the language, now in the act, "each of his employees who is engaged in commerce or in the production of goods for commerce."[2] Sections 6 and 7. See the discussion and reference to legislative history in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Walling* v. *Jacksonville Paper Co.*, No. 336, October Term, 1942. The selection of the smaller group was deliberate and purposeful.

McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause.[3] Our question is whether he was "engaged in commerce."[4] We have held that this clause covered every employee in the "channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.*, No. 336, October Term 1942, as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not.[5] Employees engaged in operating and maintaining privately owned toll roads and bridges over navigable

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[2] The distinction in the coverage arising from this choice of language was well known to Congress. Cf. National Labor Relations Act, 49 Stat. 448, 450. Labor Board *v.* Jones & Laughlin, 301 U. S. 1, 31 *et seq.*; Bituminous Coal Act of 1937, Sec. 4-A, 50 Stat. 72, 83; Agricultural Adjustment Act, 50 Stat. 246; Public Utility Holding Company Act of 1935, 49 Stat. 803 § 1(c).

[3] 52 Stat. 1061. "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

[4] Cooks employed to feed workers engaged in the production of goods for commerce have been held to be similarly engaged. Hanson *v.* Lagerstrom, 133 F. 2d 120; Consolidated Timber Co. *v.* Womack, 132 F. 2d 101.

[5] Walling *v.* Jacksonville Paper Co., supra; Higgins *v.* Carr Bros. Co., No. 97, October Term 1942.

waterways are "engaged in commerce." *Overstreet* v. *North Shore Corporation,* No. 284, October Term 1942. So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads. *Pedersen* v. *J. F. Fitzgerald Construction Co.,* No. 396, October Term 1942. Journal, Supreme Court of the United States, October Term 1942, p. 177.

In the present instance, it is urged that the conception of "in commerce" be extended beyond the employees engaged in actual work upon the transportation facilities.[6] It is said that this Court decided an employee, engaged in similar work was "in commerce," under the Federal Employers' Liability Act[7] and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive.[8]

Judicial determination of the reach of the coverage of the Fair Labor Standards Act "in commerce" must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum* v. *Walling, supra,* 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments "in commerce" under the Fair Labor Standards Act.[9]

The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment,[10] we hope, is not to be repeated in the administration and operation of the Fair Labor

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[6] The contention that the work of the employee is covered by the exemption of Sec. 13(a)(2)—"any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"—seems without significance. If the work is in interstate commerce, the exemption does not apply. Compare Consolidated Timber Co. *v.* Womack, 132 F. 2d 101, 106, *et seq.;* Hanson *v.* Lagerstrom, 133 F. 2d 120.

[7] Phila., B. & W. R. R. Co. *v.* Smith, 250 U. S. 101. This case construed the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, § 1; "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages. . . ."

[8] Walling *v.* Jacksonville Paper Co., No. 336 October Term 1942; Kirschbaum *v.* Walling, 316 U. S. 517, 524.

[9] Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556, 558; Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S. 74, 78; Chicago & E. I. R. Co. *v.* Commission, 284 U. S. 296; N. Y., N. H. & H. R. Co. *v.* Bezue, 284 U. S. 415, 419.

[10] Act of August 11, 1939, 53 Stat. 1404; Hearings, Senate Committee on the Judiciary, Amending the Federal Employers Liability Act, March 28 and 29, 1939, pp. 3-9, 26-30; S. Rep. No. 661, 76th Cong., 1st Sess.

Standards Act. Where the accident occurs on or in direct connection with the instrumentalities of transportation, such as tracks and engines, interstate commerce has been used interchangeably with interstate transportation.[11] But where the distinction between what a common carrier by railroad does while engaging in commerce between the states, i. e., transportation, and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only.[12]

The *Smith*[13] case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was "in commerce" this Court said:

"The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." 250 U. S. 101, 104.

Such a ruling under the Federal Employers' Liability Act, after the *Bolle, Industrial Commission* and *Bezue* cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as

11 Pedersen *v.* Del., Lack. & West. R. R., 229 U. S. 146, 151; cf. Overstreet *v.* North Shore Corp., No. 284, October Term 1942.

12 See the cases cited in note 9, *supra*.

13 Phila., B. & W. R. R. Co. *v.* Smith, 250 U. S. 101.

to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.[14] Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce."[15]

It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.

We agree with the conclusion of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act.

Affirmed.

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[14] Thus we said as to a rate clerk employed by a motor transportation company:

"It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act, . . ." Overnight Motor Co. *v.* Missel, 316 U. S. 572, 575.

[15] 52 Stat. 1060-61.

Sec. 3. "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

. . . . . .

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Mr. Justice MURPHY, dissenting.

I think that petitioner is covered by the Fair Labor Standards Act.

In using the phrase "engaged in commerce" Congress meant to extend the benefits of the Act to employees "throughout the farthest reaches of the channels of interstate commerce". *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567. We recently construed the phrase to include employees whose activities are so closely related to interstate commerce "as to be in practice and in legal contemplation a part of it." *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 129, 130, 132. This practical test was derived from cases such as *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S. 146, 151, and *Phila., B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, construing similar language in the Federal Employers' Liability Act.[1] The activities of petitioner in cooking for a traveling maintenance crew of an interstate railroad are sufficient to satisfy this test. It was so held in the *Smith* case, 250 U. S. 101, the facts of which are virtually identical with the instant case except for the immaterial difference that petitioner here was employed by an independent contractor rather than by the railroad itself.[2] The reasoning of the *Smith* case is persuasive and should control this one.

The opinion of the Court, however, rejects the concept of coverage used in the *Smith* case for the narrower test of whether an employee is engaged "in interstate transportation or in work so closely related to it as to be practically a part of it", used in another line of cases under the Federal Employers' Liability Act.[3] I think this is wrong for several reasons.

The Fair Labor Standards Act extends to employees "engaged in commerce", not merely to those engaged in transportation.[4] As the *Bolle* case itself points out: "Commerce covers the whole field

[1] Act of April 22, 1908, 35 Stat. 65, as it was before the amendment of 1939, 53 Stat. 1404. 45 U. S. C. § 51 *et seq.*

[2] The application of the Fair Labor Standards Act, of course, depends upon the character of the employees' activities, not the nature of the employer's business. Overstreet *v.* North Shore Corp., 318 U. S. 125, 132, and cases cited.

[3] Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556, 558; Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S 74; Chicago & E. I. R. Co. *v.* Commission, 284 U. S. 296; N. Y., N. H. & H. R. Co. *v.* Bezue, 284 U. S. 415.

[4] The Act defines "commerce" as: "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, 29 U. S. C. § 203.

of which transportation is only a part''. 284 U. S. at 78. Hence, whatever basis there may have been for restricting the coverage of the Federal Employers' Liability Act to employees actually engaged in transportation because of the fact that the Act applied only to those working for employers engaged in interstate transportation by rail,[5] can have no possible application or bearing on the interpretation of the Fair Labor Standards Act. The coverage of this Act is much more extensive. It is not limited to employees of interstate carriers but extends generally to employees engaged in all kinds of commerce, including transportation. Nothing in the Act suggests that it has a narrower application to employees whose work ''in commerce'' is transportation or work connected therewith, than it has to employees who are engaged in commerce but whose work has nothing to do with transportation. Such a construction is untenable because it would discriminate without reason between different types of employees, all of whom fall within the same general statutory classification of ''engaged in commerce''.

The necessary effect of rejecting the *Smith* case for the restrictive concept of ''in commerce'' which was used in the *Shanks*,[6] *Bolle*,[7] *Commission*,[8] and *Bezue*[9] cases is to introduce into the administration of the Fair Labor Standards Act that concededly undesirable confusion which characterized the application of the Federal Employers' Liability Act and prompted the 1939 amendment (53 Stat. 1404) which in effect repudiated the narrow test of the *Shanks* line of cases. The reality of this confusion is readily demonstrable. We have held that a rate clerk employed by an interstate motor carrier[10] and a seller of tickets on a toll bridge over which interstate traffic moves[11] are both ''engaged in commerce'' within the meaning of the Fair Labor Standards Act. Yet in the view of the majority of the Court when the employees' activities are in the field of transportation, the Act apparently will not cover[12] those who work

5 See Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S. 74, 78.

6 279 U. S. 556.

7 284 U. S. 74.

8 284 U. S. 296.

9 284 U. S. 415.

10 Overnight Motor Co. *v.* Missel, 316 U. S. 572.

11 Overstreet *v.* North Shore Corp., 318 U. S. 125.

12 This is discussed wholly apart from the question of the applicability of § 7 because of the exemption contained in § 13(b)(1) of the Act. See Southland Gasoline Co. *v.* Bayley, — U. S. —, No. 581 this Term.

in an interstate carrier's repair shop on facilities to supply power for machinery used in repairing instrumentalities of transportation,[13] or who heat cars and depots used by interstate passengers,[14] or who store fuel for the use of interstate vehicles,[15] or who work on such vehicles when withdrawn for the moment from commerce for repairs.[16] The anomaly of this is clear—there is no sound reason for extending the benefits of the Act to a rate clerk employed in the office of an interstate motor carrier and denying them to the janitor who keeps the office clean and warm, or the employee who works in the carrier's shop on machinery used to repair interstate vehicles, or on the vehicles themselves.

If the applicable provision were "engaged in the production of goods for commerce" instead of "engaged in commerce", our decisions make it clear that employees such as the janitor and the shop tender and probably petitioner would be within the Act. Cf. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88.[17] The phrase "engaged in commerce" should be as broadly construed. In the words of one of the Act's sponsors, the phrase extends to "employees who are a necessary part of carrying on" a business operating in interstate commerce.[18] Petitioner's work was evidently considered necessary to the operation of the railroad, else it would have made no provision for boarding its maintenance crews. We have cast the revelant tests for determining the scope of the two phrases of coverage in substantially similar language. In *Kirschbaum Co.* v. *Walling,* work which "had such a close and immediate tie with the process of production for commerce" as to be "an essential part of it" was held to be "necessary to the production of goods for commerce". 316 U. S. at 525-26. Correspondingly,

[13] Cf. Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556.

[14] Cf. Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S. 74.

[15] Cf. Chicago & E. I. R. Co. *v.* Commission, 284 U. S. 296.

[16] Cf. N. Y., N. H. & H. R. Co. *v.* Bezue, 284 U. S. 415.

[17] Employees cooking for workers engaged in the production of goods for commerce have been held to be similarly engaged and covered by the Act. Consolidated Timber Co. *v.* Womack, 132 F. 2d 101; Hanson *v.* Lagerstrom, 133 F. 2d 120.

[18] Speaking for the Senate conferees on the Conference Report, Senator Borah said: " . . . if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec. 9170.

in *Overstreet* v. *North Shore Corp.*, we held that the phrase "engaged in commerce" includes work which "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' ". 318 U. S. at 130. The purpose of the "production of goods for commerce" phrase was obviously not to cut down the scope of "engaged in commerce", but to broaden the Act's application by reaching conditions in the production of goods for commerce which Congress considered injurious to interstate commerce. See *United States* v. *Darby*, 312 U. S. 100. The effect of the Court's decision today, however, is to recognize that federal power over commerce has been sweepingly exercised when an employee's work is in the production of goods for commerce, but to limit it, when the employee's activities are in transportation or connected therewith, to the narrow and legislatively repudiated view of the *Shanks, Bolle, Commission* and *Bezue* cases. Such an unbalanced application of the statute is contrary to its purpose of affording coverage broadly "throughout the farthest reaches of the channels of interstate commerce" to employees "engaged in commerce".

The judgment should be reversed.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this dissent.

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